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Mexico's Caución Bursátil: Compliance with NAFTA and Enforcement Abroad

Mark Ellis Feldman*

I. Introduction.

Since 1993, Mexico has significantly reformed its banking laws, largely to meet its obligations under the North American Free Trade Agreement (NAFTA). Such reform is necessary for Mexican enterprises to gain access to more affordable credit that their competitors within the NAFTA enjoy under U.S. and Canadian law.¹ Secured financing creates more affordable credit by lowering creditor risk. While efforts to overhaul Mexico's secured financing regime have been initiated,² the current state of creating and recording secured interests in Mexico remains burdensome, and therefore uninviting, for potential foreign creditors. One secured financing mechanism, the *caución bursátil* (Securities Guaranty), introduced in 1993, is intended to offer a more workable secured interest alternative for creditors contemplating entry into the Mexican market. However, the Mexican system's continuing attention to title and the distinction between *in rem* and *in personam* interests under its secured financing regime potentially impedes the ability of a mechanism like the Securities Guaranty to bring Mexican secured financing law more into line with its NAFTA partners. Further, any ownership limitations placed on foreign actors operating within the NAFTA will also affect the ability of those actors to obtain secured interests in Mexico. From this, Mexico's *in rem/in personam* distinction within its secured financing regime, coupled with its lingering foreign ownership limitations, may have important consequences for Mexico's obligation to afford foreign financial institutions "national treatment" under article 14 of the NAFTA. Moreover, distancing title from the structure of Mexican secured financing mechanisms may bring Mexico closer to ful-

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- 1 "Under the NAFTA, Mexican enterprises will be competing on an equal basis with U.S. and Canadian enterprises that have access to cheap and more abundant credit, putting the Mexican enterprises at a competitive disadvantage." John M. Wilson-Molina, *Mexico's Current Secured Financing System: The Law, The Registries and the Need for Reform* (visited June 30, 1999) <<http://www.natlaw.com/pubs/spmxbk3.htm>>.
- 2 The National Law Center for Inter-American Free Trade, located in Tucson, Arizona, with the support of the National Association of Notaries and the College of Notaries of the Federal District of Mexico, has proposed a system of creating and recording secured interests modeled on Article 9 of the United States Uniform Commercial Code (U.C.C.). See The American Law Institute, Transnational Insolvency Project, International Statement of Mexican Bankruptcy Law, Tentative Draft (Apr. 15, 1998) [hereinafter Mexican Bankruptcy Statement], at 194.

filling its NAFTA obligations than the effective but incomplete efforts of the Securities Guaranty, the 1993 Foreign Investment Law, and the 1995 Amendments to that law.

This article will analyze issues arising from the Securities Guaranty from the perspective of a potential creditor, LongTerm Investments (LongTerm), a financial services company incorporated and domiciled in the state of New York, that wishes to finance securities market operations by Mexican debtors based in Mexico City. LongTerm would like to reduce the risk of such financing by acquiring a secured interest in publicly traded securities owned by the parties it intends to finance. LongTerm is not well acquainted with the different forms of secured financing under Mexican law, but would like to choose the method which offers the best combination of flexibility in the range of securities which may serve as collateral, efficacy in the sale and distribution of proceeds of the securities in the event of default, and priority vis-à-vis other creditors in a bankruptcy situation. LongTerm would also like to maximize the likelihood of enforcing a secured financing arrangement by a Mexican court ruling or bankruptcy decree, as well as by a United States court as to U.S.-based debtor assets.

LongTerm's potential use of the Securities Guaranty to obtain a secured interest in Mexico raises issues not only under Mexican law, but also under the NAFTA and U.S. bankruptcy law. However, discussion of these issues first requires an overview of applicable secured financing mechanisms available under Mexican law.

II. Secured Interests under Mexican Law.

Secured interests in the United States and Canada are governed by U.C.C. Article 9 (Article 9) and the Canadian Personal Property Securities Acts (PPSA) respectively. Both Article 9 and the PPSA recognize a "single, comprehensive concept of a security interest."³ Mexico, however, lacks such a comprehensive treatment of secured interests, instead addressing the concept in "an array of provisions" found in the General Law of Credit Instruments and Operations (*Ley General de Títulos y Operaciones de Crédito*, hereinafter LGTOC), the General Law of Auxiliary Credit Organizations and Activities (*Ley General de Organizaciones y Actividades Auxiliares de Créditos*, hereinafter LGOAAC) the Law of Credit Institutions (*Ley de Instituciones de Crédito*, hereinafter LIC), the Mexican Civil Code (*Código Civil para El Distrito Federal*, hereinafter Civil Code) and Commercial Code (*Código de Comercial*, hereinafter Commercial Code).⁴

The Securities Guaranty, created by the 1993 amendments to the Securities Market Law (*Ley del Mercado de Valores*, hereinafter LMV), is intended to offer a more workable alternative to the regular pledge (Pledge) secured financing mechanism, which was seen as "cumbersome and inadequate" for securities market needs.⁵ The Securities Guaranty structure requires a written agreement (Securities Guaranty Agreement) among debtor, creditor, and intermediary. Brokerage houses or other financial institutions may act as

3 *Id.* at 149.

4 See *Perfection of Security Interests in Instruments and Documents: A Condensed Comparison*, The National Law Center for Inter-American Free Trade (visited June 30, 1999) <<http://www.nat-law.com/pubs/spmxcsl.htm>>.

5 Mexican Bankruptcy Statement, *supra* note 2, at 170.

the intermediary between the debtor and creditor.⁶ The intermediary must maintain an account with the *Instituto para el Depósito de Valores* (INDEVAL)⁷, the central depository in which physical certificates representing publicly traded securities in Mexico are kept. Such an intermediary accepts publicly traded securities from the debtor as a guaranty and deposits them with the *ejecutor*. The parties may select a brokerage firm or credit institution as *ejecutor*, as long as the brokerage firm or credit institution is not also acting as the intermediary under the Securities Guaranty Agreement.⁸ A copy of the Securities Guaranty Agreement must be delivered to INDEVAL, which debits the intermediary's account for the pledged securities and credits the securities to a separate INDEVAL account established to hold the pledged securities.⁹

Upon default, the creditor notifies the *ejecutor* and requests the sale of the deposited securities. The *ejecutor* in turn notifies in writing both INDEVAL and the debtor of the default and impending sale. The debtor then has an opportunity to cure the default.¹⁰ If the debtor is unable to cure the default, INDEVAL transfers the securities to the *ejecutor's* account, who in turn sells the securities on the stock market at fair market value, the proceeds from which are used to satisfy the creditor, with any remaining proceeds going to

6 LMV article 21 states, "(t)he registration of a Company in the Intermediaries Section of the National Registry of Securities and Intermediaries grants to such company the qualification of an intermediary in the securities market."

7 INDEVAL is Mexico's central securities depository "for the custody, administration, clearing, netting, settlement, and transfer of securities in the Mexican securities market." Memorandum Examining the Need for Harmonization and Modernization of Mexico's Securities Ownership, Transfer, and Pledging Laws, National Law Center for Inter-American Free Trade 3 (1998) [hereinafter Securities Memo].

8 LMV article 99 states, "the parties by mutual consent (may) designate an executor of the securities guaranty, appointment that could fall into a brokerage firm other than the firm carrying out the transaction, or in a credit institution which does not form part of the same financial group of the brokerage firm involved in the respective transaction." Under the Securities Guaranty structure, the intermediary financial institution may accept "Mexican *cetes* (or other publicly traded securities) as a guaranty and deposit them with a third party (*ejecutor*), another *casa de bolsa*, a brokerage house, or another bank. It is essential that the depository be separate from the same financial group in order for this new structure to work." *Secured Financing of Personal Property in Mexico: A Panel Discussion*, comments of Lic. Agustín Berdeja-Prieto, at 154, <<http://natlaw.com/pubs/usmxmlaw/usmjnm20.htm>> [hereinafter Panel Discussion]. However, if not also acting as the creditor taking the security interest, "(a) brokerage house may act as both the intermediary that maintains the (Securities Guaranty Agreement) account with INDEVAL and the *ejecutor*." Securities Memo, *supra* note 7, at 23. LMV article 99 further provides that "when the brokerage firm in question is not the creditor of the obligation guaranteed, it may act as executor." Compare U.C.C. article 9-303, which permits creditor possession of collateral for perfection of a secured interest, including possession of deposited securities. See Margaret Rosso Grossman & Keith G. Meyer, *Agricultural Credit Institutions, Operations, and Guarantees in the United States*, 46 AM. J. COMP. L. 275, 302 (1998).

9 See Securities Memo, *supra* note 7, at 23.

10 The debtor may cure by either paying the debt or, in the case of default due to a drop in the value of the securities, by sufficiently providing additional securities to secure the obligation.

the debtor.¹¹ This extrajudicial liquidation and delivery of proceeds to the creditor expedites the default process as compared with the Pledge. Further, the only formality required under the Securities Guaranty is that the written agreement be delivered to the INDEVAL with no additional delivery or registration requirements. This freedom from formal requirements, coupled with the extrajudicial sale and distribution mechanism, is a more streamlined procedure than that offered by the Pledge.

III. The Pledge under Mexican Law.

Mexican law recognizes both civil and commercial pledges for the creation of secured interests. Mexico, as a civil law system, creates a dual statutory framework for governing commercial and civil transactions. Transactions determined to be principally civil in nature are governed by the Civil Code, while transactions determined to be principally commercial in nature are governed by the Commercial Code.¹² Accordingly, a Civil Pledge in Mexico is governed by the Civil Code, while a commercial pledge (*la prenda mercantil*, hereinafter Commercial Pledge) is governed by the Commercial Code, with supplementary Civil Code coverage.¹³

The Civil Code defines a Pledge, whether civil or commercial, as a "(p)roperty right *in rem* over movable, alienable goods for the purpose of guarantying the performance of an obligation and its priorities in payment."¹⁴ *In rem* rights are enforceable against both the debtor and third parties, as distinguished from *in personam* rights, which are only enforceable against the debtor. A Pledge qualifies as "commercial" if it guarantees one or more "enumerated acts of Congress" under article 75 of the LGTOC. If the pledged goods consist of investment securities, the Pledge is commercial as a matter of law.¹⁵

11 See Securities Memo, *supra* note 7, at 23. LMV article 99 provides, "If the grantor of the guaranty does not exhibit or credits the payment or increases the guaranty in a sufficient amount, as the case may be, the executor will order the sale of the securities guaranteed through a stock exchange, at the corresponding market price, up to the amount required to cover the principal and agreed expenses, which will be delivered to the creditor. If any balance should remain, either in cash or in securities, it will be placed at the disposal of the guarantor."

12 Generally, Mexican civil law includes family law, property law, contract law, and the law of succession, while Mexican commercial law includes corporate law, banking law, negotiable instrument law, bankruptcy, maritime, and insurance law. See David W. Banowsky, *Possibilities for Cross-Border Asset-Backed Lending in Mexico*, 1 NAFTA: L. & BUS. REV. AM. 20 (Autumn 1995).

13 At least two decisions by the Mexican Supreme Court have held commercial pledges to be exclusively covered by the LGTOC, with no supplementary Civil Code coverage. However, such decisions do not have binding *jurisprudencia* effect. See TODD C. NELSON, HARMONIZATION OF THE SECURED FINANCING LAWS OF THE NAFTA PARTNERS: FOCUS ON MEXICO 17 (1995) (citing *Banco Comercial Mexicano*, 11 *Boletín de Información Judicial* 671 (1956); Oscar Torres, 113 S.J.F. 5a. 943 (1952)).

14 John Gerber, *Secured Credit Devices in Latin America: A Comparison of Argentina, Brazil, and Mexico*, 23 U. MIAMI L. REV. 680 (1969) (citing Civil Code article 2856).

15 See NELSON, *supra* note 13, at 17 (citing LGTOC article 1).

Under the Civil Code, a Pledge is evidenced by a written pledge agreement (Pledge Agreement) and perfected by actual delivery to the pledgee.¹⁶ Similarly, LGTOC article 334 requires for commercial pledges delivery of the pledged goods either to the creditor or a third party depository.¹⁷ Constructive delivery may be obtained by use of such a third party depository, or, in the case of the "*habilitacion o avio*" or "*refaccionario*" mechanisms, by the pledgor retaining possession of the pledged goods.¹⁸ However, perfection of a secured interest using constructive delivery requires registration of the Pledge Agreement so as to provide notice to third parties.¹⁹ Even when the Commercial Code does not expressly require registration, Mexican lawyers often imply a common-usage registration from the customary understanding that, for a non-possessory pledge to be valid against third parties, the Pledge must be registered in the Public Registry of Property and Commerce.²⁰ Registration can be an "expensive formality,"²¹ with duties paid to the public registry while nonetheless remaining vulnerable to super-priority claims from unpaid workers and tax authorities, discussed in detail in the bankruptcy section below.

In addition to the Pledge's requirements of delivery or registration for perfection of the interest, a creditor can only initiate a sale of the pledged goods by public auction by petitioning a court, and only after the guaranteed obligation under the Pledge Agreement matures. Unlike the Civil Pledge, however, under the Commercial Pledge a creditor may

16 See Civil Code article 2858. However, if delivery is constructive, where the pledge res is delivered either to a third party, or actually retained by the debtor, registration is required for perfection of the interest. David W. Banowsky & Carlos A. Gabuardi, *Secured Credit Transactions in Mexico*, 28 INT'L LAW. 263, 280 (1994) (citing Civil Code articles 2859, 2860).

17 See Mexican Bankruptcy Statement, *supra* note 2, at 155.

18 The *credito de habilitacion o avio* (production credit) and *credito refaccionario* (installation credit) are special mechanisms for collateralizing credits which are secured by certain materials or equipment the continued possession of which is necessary for the debtor to operate their business. Because of the debtor's practical need to maintain possession over such goods, Mexican law allows for an exception to the ordinary secured financing requirement of delivery of the pledged goods to the creditor or third party depository. See John E. Rogers & Carlos de la Garza-Santos, *General Goods: A Case Involving Security Interests in Inventory and Accounts in the United States, Canada, and Mexico*, 5 U.S.-MEX. L.J. 3 (1997). Under either of these mechanisms, the pledgor is limited to specified uses of any credit arising from these mechanisms. See Mexican Bankruptcy Statement, *supra* note 2, at 156.

19 Civil Code article 2859 states, "*Cuando la prenda quede en poder del deudor, para que surta efectos contra tercero debe inscribirse en el registro public.*" A pledge agreement may be registered by recording the agreement in the Public Registry of the city where the funds are located. See John E. Rogers, *Secured Financing of Personal Property in Mexico: A Panel Discussion*, 2 U.S.-MEX. L.J. 149, 153 (1994).

20 See Wilson-Molina, *supra* note 1, at 11. The Commercial Code expressly permits reliance on custom to create law. See Commercial Code arts. 2, 11, 308. Customary law may be established by the repeated reliance of Mexican courts on a certain custom as a source of law. More generally, "it requires a consistent pattern of behavior by nation-states and a belief by those states that such behavior is legally required." Patrick M. McFadden, *Provincialism in United States Courts*, 81 CORNELL L. REV. 4, 53 (1995) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) cmts. b, c).

21 Thomas S. Heather & Martha Trardt Collins, *Secured Financing of Machinery & Equipment, Including Cross-Border Leasing and Conditional Sales Contracts*, 5 U.S.-MEXICO L.J. 23, 25 (1997).

also petition the court before a guaranteed obligation matures if the value of the pledged goods falls below 120 percent of the debt amount.²² However, even under the Commercial Pledge's broader remedy scheme, the required judicial role in the sale and redistribution of proceeds from the pledged securities imposes significant transaction costs upon a creditor attempting to reclaim an outstanding debt.

Notice of the creditor's request for a judge-conducted sale and redistribution of the collateral is given to the debtor. The debtor may oppose the sale within three days if tendering the amount of the indebtedness, increasing the amount and thereby the value of the pledged goods, or making the necessary payments due on the pledged securities.²³ If the sale does occur, the collateral must be sold at market price, which for publicly traded securities would be the price quoted on the exchange.²⁴ The proceeds from a sale are kept in pledge rather than passing to the creditor directly. Therefore, under the Pledge mechanism, a creditor is only secured by the substitution of one type of value for another to be held in pledge—sale proceeds in place of the pledged good itself—rather than directly receiving the proceeds from the judicially-administered sale.²⁵

One response to the criticism that sale proceeds should pass directly to the creditor under the Pledge is that LGTOC article 335, which provides that *in rem* rights of the

22 See Agusta Berdefa-Prieta, *Debt Collateralization and Business Insolvency: A Review of the Mexican Legal System*, 25 U. MIAMI INTER-AM. L. REV. 227 (1993) (citing LGTOC articles 340, 342).

23 See Mexican Bankruptcy Statement, *supra* note 2, at 158 (citing LGTOC articles 340-42), which read as follows:

Article 340. Any creditor and the trustee may request the annulment of the agreement, although the periods for appeal have passed, based upon the following reasons:

- I. Defects in the procedures set for the notification, celebration and deliberation of the meeting of the creditors;
- II. The failure of the appearance or representation of any of the voters, whenever their vote decides the majority in number or quantity;
- III. Fraudulent information between the debtor and one or more creditors or among the creditors, causing them to vote for the agreement;
- IV. Fraudulent exaggeration of claims to achieve the majority of amount;
- V. Fraudulent errors in the general balance sheet of the business of the bankrupt or in the information of the trustee to facilitate the admission of the proposals of the debtor.

Article 341. The opposing creditor who is trying to annul the agreement, according to the previous article shall prove that he did not know the reasons that the latter alleges as a basis for his opposition.

Article 342. The special recourse of nullity may only be interposed within three months following the date of the executory sentence of approval of the agreement and shall be substantiated in writing.

24 See NELSON, *supra* note 13, at 33 (citing LGTOC article 341).

25 One Commentator has described this element of the regular Pledge as "incomprehensible." See *id.* (citing Doctor Joaquin Rodriguez y Rodriguez, who argued that the sale proceeds should pass to the creditor rather than merely creating "a substitution value for a defaulted obligation." Rodriguez y Rodriguez, Joaquin. *Derecho Mercantil*. Decimo-octava Edicion. Editorial Porrúa, S.A., Mexico, 1985, Tomo II, p. 266).

Pledge follow the pledged good, even if substituted for other fungible goods,²⁶ can be analogized to the proceeds provisions of article 9 and the PPSA.²⁷ However, such a construction requires understanding "fungibility" broadly enough to include merely an equality of replacement monetary value. Moreover, given the general civil law rule that all creditors have equal standing when attempting to satisfy claims out of a debtor's assets, "the legislative provisions creating and defining the rights of secured creditors are strictly construed."²⁸ Questions of construction aside, it remains clear that under the Securities Guaranty, the *ejecutor* is empowered to directly transfer the proceeds from a sale of pledged securities to the creditor, while under the regular Pledge the precise relationship between the creditor and proceeds from a judge-conducted sale of pledged goods is more controversial. The transaction costs imposed by judicial control over both the sale and redistribution of proceeds phases of the Pledge mechanism procedure significantly weaken the appeal of the Pledge vis-à-vis the Securities Guaranty for a potential creditor like LongTerm.

In addition, because a pledge creates a right *in rem* over the pledged goods, the pledgee's claim will follow the inventory into the hands of good-faith buyers and continue unless the secured debt is satisfied or the pledgee expressly releases his lien. Thus, ordinary course buyers in Mexico, if desiring full confidence in the title being acquired, must bear the formidable burden of determining that the item is not subject to a pledge.²⁹ Article 9, in contrast, offers greater protection for ordinary course buyers, even when a security interest is perfected and when the buyer knows of its existence.³⁰

The Securities Guaranty's freedom from registration requirements, while lowering a creditor's transaction costs, may raise due process concerns by creditors who lack notice of a "secret lien" encumbering a debtor subject to the Securities Guaranty. Although INDEVAL, as a central depository institution, must assure the confidentiality of its holdings,³¹ article 72 of the LMV likely provides relief from such due process concerns: any person "giving bona fide evidence of having a legitimate interest" in information on the holdings of a securities depository institution may obtain such information from the institution.³²

26 Article 335 reads, "When fungible assets or instruments are given in pledge, such pledge will survive and continue to exist even when such assets or titles are substituted by other assets or titles of the same specie." Note that article 335 refers to specie, but not quality or quantity. See NELSON, *supra* note 13, at 21.

27 See Wilson-Molina, *supra* note 1, at C(3).

28 David W. Banowsky & Carlos A. Gabuardi, Secured Credit Transactions in Mexico, 28 INT'L LAW. 263, 264 (1994) (citing John Gerber, *Secured Credit Devices in Latin America: A Comparison of Argentina, Brazil, and Mexico*, 23 U. MIAMI L. REV. 680 (1969)).

29 See NELSON, *supra* note 13, at 29.

30 U.C.C. § 9-307(1) states, "A buyer in ordinary course of business other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence." U.C.C. § 9-307(1) (1998).

31 "Under article 72 of the Securities Market Law, and in the same manner as banks and brokerage houses, central depository institutions operations are confidential and cannot be revealed to any person other than the interested parties, except for judicial and tax authorities." Mexican Bankruptcy Statement, *supra* note 2, at 175 (fn. 395).

32 LMV article 72.

While the Pledge lacks the expedience and flexibility of an extrajudicial auction³³ and carries the uncertainty of the creditor's status vis-à-vis proceeds from a sale of pledged goods, the regular Pledge does create a right *in rem* in such goods, granting the creditor priority in a bankruptcy setting that an *in personam* interest created by Securities Guaranty does not. The Securities Guaranty Agreement merely gives rise to an *in personam* interest because the creditor holds an interest in the account that contains the securities, rather than a traceable right in the underlying securities themselves. This inability to secure an *in rem* interest would be further frustrated for LongTerm if the deposited securities fall under a category of publicly held securities whose ownership is limited either partially or completely to Mexican nationals, such as *cetes*,³⁴ or if the securities represent equity interests in corporations whose ownership is limited partially or completely to Mexican nationals by law.³⁵ The ability of a potential creditor to evaluate the merits of securing an interest either via the Pledge or Securities Guaranty is preserved by article 99 of the LMV, which merely creates an optional alternative to, rather than mandatory replacement of, the Pledge. However, a third secured financing option for LongTerm exists, the Guaranty Trust.

IV. The Guaranty Trust.

Another secured interest mechanism which allows securities to be deposited with a third party is the guaranty trust (*fideicomiso de garantía*, hereinafter Guaranty Trust). The trust agreement (*fideicomiso*, hereinafter Trust Agreement) is similar in structure to a common law trust. A settlor (*fideicomitente*, hereinafter settlor) conveys collateral to a trustee (*fiduciario*, hereinafter trustee), for the benefit of a beneficiary (*fideicomisario*, hereinafter beneficiary). The Guaranty Trust transfers legal title (*el Dominio*) from the settlor to the trustee.³⁶

The Guaranty Trust offers two principle advantages. First, as under the Securities Guaranty, an extrajudicial auction procedure may be established in the Trust Agreement. Second, unlike the Securities Guaranty, once delivered to the trustee, the property held in trust legally leaves the estate of the debtor to become part of the trust's estate. Therefore, even in a bankruptcy proceeding, property held in trust, being "off the books" of the debtor, is beyond the reach of creditors.³⁷ However, if the debtor remains the beneficiary of any of, or proceeds from, the property held in trust, such property may remain subject

33 Indeed, such proceedings under the regular pledge "usually take at least a few months to conclude . . . (and) if a debtor has the means and is so inclined . . . the sale of the collateral could easily be delayed for up to two years." See NELSON, *supra* note 13, at 34.

34 See HAROLD S. BLOOMENTHAL, 4A INTERNATIONAL CAPITAL MARKETS AND SECURITIES REGULATION 10C: "Mexico" (1990). "*Cetes*" are short-term, peso-denominated, government-issued debt. Limiting foreign investor access to these securities in favor of Mexican nationals is intended to produce a stabilizing effect within a capital market system prone to shocks of foreign capital flight. See, e.g., Nora Lustig, *Mexico in Crisis, the U.S. to the Rescue: The Financial Assistance Packages of 1982 and 1985*, 2 UCLA J. INT'L L. & FOR. AFF. 25 (1997).

35 These limitations, under Mexico's Foreign Investment Law, are discussed in detail below.

36 Wilson-Molina, *supra* note 1, at 16.

37 Mexican Bankruptcy Statement, *supra* note 2, at 168.

to the bankruptcy estate. The Guaranty Trust is governed generally by the LGTOC and the LIC, and may be created to include receivables, instruments, monies, and securities, which are entrusted to the *fiduciario*, which is normally a financial institution, but may also be an insurance company, bonding company, or brokerage house.³⁸ Perfection of a Trust Agreement requires the agreement to be in writing and comply with applicable laws governing transfer of the entrusted rights and/or property.³⁹ When the deposited goods are securities, the Trust Agreement need not be notarized, and may simply be formed by the settlor, trustee, and beneficiary.⁴⁰ In the event of default, typically the trustee will be authorized to collect or dispose of the assets without judicial intervention, pursuant to the terms of the corresponding Trust Agreement.⁴¹ However, the trustee must be expressly and specifically authorized to carry out the beneficiaries' instructions, or the extrajudicial advantage of the Guaranty Trust structure will be lost.⁴²

In addition, trustee fees may themselves be significant obstacles to the efficacy of the Guaranty Trust. While banks set schedules as ceilings for trustee fees, lesser rates can be negotiated and will vary according to the nature of the property.⁴³ Trustee risk turns on the extent to which they are obligated to participate in administration of the collateral, and are therefore exposed to potential personal liability. Forming a technical committee to direct trustee decisions can reduce such liability.⁴⁴

For bankruptcy purposes, deposited goods are removed from the debtor's estate under the Guaranty Trust, but not the Securities Guaranty.⁴⁵ However, while debtor insolvency is a more important issue under the Securities Guaranty than the Guaranty Trust, intermediary insolvency—that of the *ejecutor* under the Securities Guaranty and of the trustee under the Guaranty Trust—remains important for both mechanisms.

Mexican law is unsettled as to whether an investor has a property or contractual interest in a securities account held by an intermediary.⁴⁶ U.C.C. article 8, which governs securities holding mechanisms, confers upon the investor an interest in a pro-rata portion of a pool of securities held by an intermediary with whom that investor has a direct

38 Berdeja-Prieto, *supra* note 8, at 237. Brokerage houses are expressly permitted to act as trustees by LMV article 22 section IV, which provides that brokerage houses may "act as trustees in businesses which are directly linked to their own activities."

39 LGTOC article 352.

40 Securities Memo, *supra* note 7, at 25.

41 *Id.*

42 Absent agreement on the terms of liquidation, LMV article 103 requires the trustee to follow certain procedures, including the LGTOC article 341 requirement that the beneficiary notify the appropriate court of debtor default, and request judicial permission to liquidate the deposited goods. Securities Memo, *supra* note 7, at 25.

43 *Id.* at 34.

44 *Id.*

45 While "credits supported by a securities guaranty enjoy no special right in bankruptcy," "in the case of a guaranty trust settled by the debtor, the assets securing the obligation have left the debtor's estate pre-insolvency." Mexican Bankruptcy Statement, *supra* note 2, at 177, 179.

46 "Language used in certain provisions of the LMV suggests that the investor holds a property interest in securities held indirectly through an intermediary." Securities Memo, *supra* note 7, at 8.

contractual relationship.⁴⁷ Arguments that Mexican law provides for a property interest in such deposited securities rely largely on the agency relationship created by the Securities Guaranty arrangement. LMV article 90 provides that for "securities intermediation contracts," pursuant to which the Securities Guaranty is created, investors grant the brokerage firm a "general mandate" to act on their behalf. Therefore, it is argued, such a commercial mandate creates an agency relationship that implies control and ownership over the securities by the principal, meaning the beneficiary.⁴⁸

The Guaranty Trust structure, in contrast, is not as easily framed as an agency relationship, given both the needs to expressly and specifically empower the trustee, as well as the significant risk of personal liability faced by trustees. Commercial Code article 285 provides, "If an agent contracts expressly in the name of the principal, he shall not incur personal liability and his rights and obligations shall be those under a common mercantile agency pursuant to the provisions of the civil law." However, one of the most significant drawbacks to the Guaranty Trust structure is the risk of trustee unwillingness to execute a Trust Agreement for fear of such action resulting in personal liability as a violation of the debtor's due process rights.⁴⁹ Further, the LMV limitations placed on intermediary control over deposited securities,⁵⁰ which also serve to strengthen the argument for a creditor's property interest in deposited securities under Mexican law, are more applicable to the Securities Guaranty structure, which exclusively concerns securities, than the Guaranty Trust structure, which includes all classes of goods and rights, excepting strictly personal rights.⁵¹ Therefore, while the Guaranty Trust may provide for better protection against debtor insolvency, the Securities Guaranty, which provides better support for claiming a creditor's property interest in securities held by an intermediary, may provide for better protection against intermediary insolvency as well as stronger support generally for any claim to securities held by a third party depository.

However, strong arguments also exist for the Securities Guaranty merely giving rise to a contractual claim against the intermediary. Specifically, the fungibility of securities held by intermediaries is in tension with the civil law emphasis on the ability to identify and trace any goods over which one may have a property interest.⁵² However, LMV article 68, which requires intermediaries to maintain a separate INDEVAL account for their customers' securities, may be seen as characterizing a particular account of securities more concretely than as a mere fungible portion of a larger genus.⁵³

The need to create arguments in favor of a creditor's property right in collateral deposited with third parties under Mexican law illustrates the importance of title for strengthening the position of secured creditors in civil law systems. Article 9 has rendered title irrelevant for determining the existence of a security interest and the rights of the parties to the secured transaction.⁵⁴ Mexico's continuing emphasis on title and *in rem*

47 Securities Memo, *supra* note 7, at 7.

48 *Id.* at 8.

49 Heather & Collins, *supra* note 21, at 23.

50 See, e.g., LMV articles 78 and 95, and Securities Memo, *supra* note 7, at 8.

51 LGTOC article 351.

52 Securities Memo, *supra* note 7, at 9.

53 *Id.*

54 See U.C.C. § 9-202.

interests when analyzing secured transactions may undermine the ability of a mechanism like the Securities Guaranty to bring Mexican secured financing law more into line with its NAFTA partners. However, just as appeal to custom and usage has given rise to the "common usage registration" of commercial pledges,⁵⁵ perhaps such practical concerns can also create an implied property interest for the creditor under the Securities Guaranty. Appeal to custom and usage in creating law is expressly permitted by the Commercial Code.⁵⁶ While such a development may be an important step in separating title from secured interest analysis under Mexican law,⁵⁷ the use of custom to create legally binding registration requirements is unprecedented, challenging any attempt to similarly imply a legally binding property interest from the Securities Guaranty.

Moreover, implying a possessory interest from the Securities Guaranty may bring Mexican secured financing law closer to its historical basis in the Roman Law *pignus*, which represented a secured transaction in which possession of a movable good was transferred from debtor to creditor.⁵⁸ While the Roman *pignus* did require ownership for *in rem* actions, such lack of ownership did not prevent the creditor from qualifying for a possessory interdict.⁵⁹

These issues of reform aside, LongTerm should consider whether the value of securing a possessory interest by way of the Pledge outweighs the flexibility and efficiency advantages of the Securities Guaranty and Guaranty Trust. If opting for flexibility and efficiency, LongTerm should then weigh the relative merits and risks of the Securities Guaranty and Guaranty Trust as to exposure to debtor and/or intermediary default, risk of personal liability, strength of claim to deposited collateral, and the cost of formalities for creating and perfecting the secured interests. However, such analysis requires discussion of Mexico's continued adherence to an *in rem/in personam* distinction within secured financing and the consequences of this distinction for bankruptcy.

V. Mexico's Roman Law Heritage: Title Requirements for *In Rem* Interests.

Mexico, unlike the United States and Canada, is a civil law system, which reflects traces of its Roman Law heritage. The enduring requirement, under the Civil Pledge, of actual delivery of secured goods to the creditor reflects the delivery requirement of the ancient Roman pledge.⁶⁰ Of the NAFTA countries, only Mexico distinguishes *in rem* from *in personam* interests when analyzing secured interests, and thereby limits the scope within which a secured creditor may enforce their interest.

55 See discussion of common usage registration, *supra*.

56 Commercial Code articles 2, 11, 308.

57 Certainty in the law of secured transactions requires that the different secured transactions be reduced to one right. This right cannot be based upon a claim of ownership or of title. Instead, it should be based upon a claim to the possession of the collateral. What borrowers grant to lenders in a secured transaction is not an absolute and exclusive right of ownership, but a relative right to obtain possession.

NELSON, *supra* note 13, at 119.

58 Alejandro M. Garro, *Security Interests in Personal Property in Latin America: A Comparison with Article 9 and a Model for Reform*, 9 Hous. J. INT'L L. 157, 163 (1987).

59 *Id.* at 165.

60 Wilson-Molina, *supra* note 1, at section V(A).

In rem rights refer to rights in things, which the ancient Romans applied to "objects that are counted, weighed, or measured."⁶¹ Under Mexican law, rights *in rem* are "specifically set forth in the law" (such as ownership and usufruct), while *in personam* rights may include both rights expressly set forth and rights that "arise in non-specific or atypical ways" (such as rights arising out of contracts or torts).⁶² The Mexican system maintains the Roman distinction between concrete and less clearly defined interests. This distinction sharply contrasts with the U.C.C. and PPSA regimes:

For security purposes, title to personalty is immaterial in the United States and Canada. U.S. and Canadian lenders may retain neither title nor a reversionary claim to title in order to secure payment, as do conditional sellers in Mexico. If they attempted to do so, the courts would simply re-characterize their 'title' as a security interest subject to Article 9 or the PPSA. As a result, arguments based on the location of title are irrelevant in the United States and Canada.⁶³

Therefore, while all three systems characterize *in rem* interests as enforceable against both the debtor and third parties, and *in personam* interests as only enforceable against debtors, under Article 9 and the PPSA, secured interests are by definition *in rem*,⁶⁴ while Mexican law looks more to title than secured interests for determining *in rem* interests.

One consequence of this emphasis on ownership is the potentially burdensome registration requirements under the commercial pledge. The requirement that registries provide historical information concerning the chain of title to the pledged goods, where goods such as securities are of a "changing, ephemeral or untraceable" nature, renders the registry in a securities context nearly unworkable.⁶⁵

Another consequence of the *in rem/in personam* distinction is that in Mexico, the majority of categories of secured interests merely create *in personam* rights.⁶⁶ From this, creditors looking to limit exposure to risk by use of secured financing may nonetheless face significant risk in the form of a lack of priority in bankruptcy. While the pledge mechanisms, including the *avio* and *refaccionario* credits, give rise to *in rem* interests upon perfection in the form of registration, no such publicity, and therefore no *in rem* interest, is available to a creditor under the Securities Guaranty.

61 *Id.*

62 *Id.*

63 *Id.* at 47.

64 Secured interests under U.S. law are defined as creating "an express interest in property; namely, the right to repossess an asset of the debtor in default and the right to take the asset ahead of other persons with claims against the debtor in question." Wilson-Molina, *supra* note 1, (citing RICHARD E. SPEIDEL ET AL., SALES AND SECURED TRANSACTIONS 42 (5th ed. 1993)).

65 NELSON, *supra* note 13, at 8.

66 The Mexican Bankruptcy Statement enumerates eight categories of secured interests under Mexican law, only three of which create *in rem* rights. The mortgage, pledge (which includes the *avio* and *refaccionario* credits), and pledge bonds create rights *in rem*, while the *aval*, bond, letter of credit, guaranty trust, and securities guaranty create rights *in personam*. Mexican Bankruptcy Statement, *supra* note 2, at 148.

VI. Bankruptcy Consequences of the In Rem/In Personam Distinction.

"The risk of debtor insolvency is a major (perhaps the major) determinant of whether a credit transaction will be seen as profitable for the creditor."⁶⁷ Under the Mexican Bankruptcy Law (*Ley de Quiebras y Suspensión de Pagos*, hereinafter LQSP), creditors of the bankrupt are prioritized by placement in one of six categories, each category receiving its full share before the next group enters the distribution: (i) Singularly privileged creditors (which includes bankruptcy estate administration costs and labor claims for accrued wages and severance pay); (ii) Mortgage and Pledge creditors; (iii) The Federal Treasury for unpaid federal taxes; (iv) Creditors with special privilege (which includes commission agents, merchandise vendors, and carriers); (v) Generally unsecured commercial creditors; (vi) Generally unsecured civil creditors.⁶⁸

Although Pledge creditors are given relatively high priority under the LQSP scheme, unpaid wages and severance pay may exhaust a significant portion of the pledgee's collateral.⁶⁹ Securities Guaranty creditors, lacking an *in rem* interest in the collateral, would fall under category (v), "generally unsecured commercial creditors" since, as noted above, use of securities as collateral is commercial as a matter of law. Therefore, were LongTerm to opt for the Securities Guaranty, they would only have preference over "generally unsecured civil creditors." LongTerm's desire to lower its credit risk appears difficult to achieve in a bankruptcy setting: administration costs of the bankruptcy estate and labor claims ("singularly privileged creditors"), mortgage and pledge creditors, unpaid taxes, and commission agents and merchandise vendors would all have preference over LongTerm,⁷⁰ and would indeed need to satisfy their claims entirely from the bankruptcy estate before LongTerm could even begin to share pro rata in the distribution among other creditors in its category.⁷¹

However, in exchange for this relatively high exposure to debtor default, LongTerm would likely have a stronger possessory claim to the deposited securities,⁷² and likely, less exposure to liability arising from due process claims, given that the extrajudicial Securities Guaranty procedure is expressly laid out in LMV article 99, while the Guaranty Trust maintains a judicially-administered default procedure absent party consent to the contrary.⁷³ Moreover, a bankruptcy judge may choose not to recognize a Guaranty Trust Agreement if formed during a "suspicious period" prior to the debtor declaration of bankruptcy, and order that the deposited collateral not be separated from the bankruptcy estate.⁷⁴

67 Neil B. Cohen, *Harmonizing the Law Governing Secured Credit: The Next Frontier*, 33 TEX. INT'L L.J. 173, 174 (1998).

68 LQSP articles 262-65. Discussed in Charles A. Beckham, Jr. & Roberto Fernandez, *Cross-Border Insolvency: The Bridge You Never Want to Cross*, 4 NAFTA: L. & BUS. REV. AM. 50, 60 (Winter 1998).

69 NELSON, *supra* note 13, at 35.

70 Beckham & Fernandez, *supra* note 68, at 50.

71 Banowsky & Gabuardi, *supra* note 16, at 284.

72 See arguments for possessory interests arising from the Securities Guaranty above.

73 See LMV art. 103, referring to procedures in LGTOC art. 341.

74 Under Mexican bankruptcy law, the court may determine at what time the company became insolvent. Any transactions occurring, or security interests created, during this so-called "suspicious period" will not be recognized. Heather & Collins, *supra* note 21, at 30.

Mexico's focus on title for *in rem* interests also has potential consequences under NAFTA. Any ownership limitations placed on foreign actors operating within the NAFTA affects the secured interests of those actors. Therefore, the issue of priority in bankruptcy for LongTerm gives rise to the larger issue of Mexico's obligation to afford foreign financial institutions "national treatment" under article 14 of the NAFTA.

VII. NAFTA Article 14: Non-Preferential Treatment of Financial Institutions.

Chapter 14 of the NAFTA governs the treatment each NAFTA government must provide financial institutions within its territory that are owned or seek to be owned by investors in other NAFTA countries, as well as investors in other NAFTA countries providing cross-border financial services between NAFTA countries. Under article 1405, each country must provide financial services firms from other NAFTA countries, treatment that is "no less favorable" than the treatment it provides domestic firms in like circumstances. This "national treatment" requirement can be met by providing equally competitive opportunities to domestic and foreign-owned firms.⁷⁵ Mexico took a major step towards compliance with article 1405 with passage of the Foreign Investment Law in 1993, which liberalized restrictions on the participation of foreign financial groups within the Mexican economy.⁷⁶ Under the new law, with the exception of certain restricted sectors, foreigners may own without restriction the equity of a Mexican corporation.⁷⁷ Therefore, the applicable NAFTA inquiry for LongTerm may focus on whether, in light of the 1993 Foreign Investment Law (FIL) and subsequent 1995 Amendments to Mexican banking law (1995 Amendments), the treatment of LongTerm under Mexican law is "no less favorable" than the treatment such law affords to Mexican financial institutions. Such an inquiry requires analysis of the protections available to LongTerm, vis-à-vis Mexican creditors, under the Securities Guaranty specifically and Mexican secured financing mechanisms generally.

While the LQSP regime, discussed above, may not establish optimal incentives for foreign investment in Mexico, it does not directly implicate NAFTA article 1405 unless Mexican financial institutions would be treated more favorably than LongTerm under Mexican law. A Mexican financial institution making use of the Securities Guaranty would also receive a mere *in personam* interest in the secured assets, and would therefore also be placed into the "generally unsecured commercial creditor" category under the LQSP.

However, if the secured assets were of a category that only Mexican nationals may own, then, by definition, a foreign investor could not have title to, and thus could not obtain an *in rem* interest in, such assets. This has important consequences for the regular Pledge. Under this mechanism, categories of publicly traded securities whose ownership is limited to Mexican nationals constitute categories of assets over which Mexican nationals, but not foreigners, may obtain a secured interest which will be given preference under the LQSP. Therefore, any limits on foreign ownership under the FIL, for purposes of NAFTA article 1405, speak to the Pledge in terms of preferential treatment for Mexican financial institu-

75 NAFTA Chapter 14 Summary, available in Westlaw NAFTA database.

76 See *id.* at 141.

77 See Humberto Gayou & Robert G. Gilbert, *Legal Building Blocks for Structuring Sales in the Mexican Market*, 25 ST. MARY'S L. J. 1115, 1125 (1994).

tions. However, the denial of *in rem* interests on account of ownership limitations do not implicate the Securities Guaranty or Guaranty Trust mechanisms, since their very structures do not confer title upon the secured creditor, regardless of nationality.

Nonetheless, such limitations may impact LongTerm's ability to expand the scope of its financial services in Mexico. For example, if LongTerm wanted to expand beyond its creditor role within the Securities Guaranty structure, and take on the role in certain transactions of a third party brokerage house trustee, the ownership limitations placed on brokerage houses, and on certain categories of publicly traded securities, would impede LongTerm's expansion vis-à-vis unrestricted Mexican brokerage houses. Even after the liberalizing 1995 Amendments, the limitations placed on LongTerm remain significant.

In addition, the options presented to LongTerm for obtaining a secured investment in Mexico, if significantly less attractive than those offered by Article 9 or the PPSA, may undermine the stability of the NAFTA economy, given the aggregate effects of potential investors like LongTerm. "The need (for security mechanisms on personal property in Mexico) is especially important since under the NAFTA, Mexican manufacturers, wholesalers, and retailers are now competing with U.S. and Canadian firms, which do avail themselves of the asset maneuverability and cheaper credit that Article 9 of the U.C.C. and the Canadian Personal Property Security Act provide."⁷⁸ Under Article 9, a secured loan creates an express interest in property, with a right to repossess an asset of the debtor in default, including a priority right to such an asset vis-à-vis other creditors.⁷⁹ Moreover, a creditor may resort to extrajudicial, self-help means in the repossession of such an asset, which is forbidden by the Mexican constitution.⁸⁰ Therefore, the enduring role of title in Mexican secured financing law, with its consequences in bankruptcy as discussed above, arguably challenges the stability of the NAFTA regime when potential investors like LongTerm—whether American, Mexican, or Canadian—repeatedly opt out of the Mexican market, and thereby fail to provide more affordable credit for the developing Mexican economy.

Article 6 of the FIL limits ownership of corporations exclusively to Mexican nationals for certain limited industries.⁸¹ Article 7 places softer limits on foreign ownership, but over a much wider range of industries.⁸² Most relevant for LongTerm, foreign ownership may not exceed thirty percent for financial group holding companies, commercial banking credit institutions, securities brokerage firms, and securities market specialists. Therefore, secured *in rem* interests in securities of companies operating in any of the industries enumerated in articles 6 and 7 of the FIL may be available to Mexican financial institutions yet unavailable, or available only in part, to LongTerm. Moreover, if LongTerm were considering participation in Securities Guaranty arrangements from the intermediary brokerage firm side, its ownership of such an operation would be limited to thirty percent, while Mexican firms could run such enterprises outright. LongTerm's

78 Wilson-Molina, *supra* note 1, at 24.

79 See *id.* at 2, citing to U.C.C. §§ 9-102, 9-501, 9-507 (1977).

80 U.C.C. 9-503; *La Constitución Política de Los Estados Unidos Mexicanos* art. 16.

81 These industries include national service transportation, petroleum, broadcasting, credit unions, development banking institutions, and professional services "expressly set forth in the applicable legal provisions." FIL art. 6 §§ I-VI.

82 *Id.*

interest in including such brokerage activities within its financial services offerings may fall under NAFTA article 1403, which requires that financial institutions not only be able to establish operations in other NAFTA countries, but to expand such operations within that territory.⁸³ However, the "expansion" of such operations may be narrowly construed to mean providing the identical financial services throughout a wider physical range of a given territory, rather than expanding on the range of financial services provided in a given territory. However, NAFTA provides much broader possibilities of expansion for foreign companies operating in other NAFTA countries.⁸⁴

Although foreign investors are broadly empowered to expand operations in other NAFTA countries, the FIL limitations on foreign ownership may fall under NAFTA's "prudential carve-out" provision, article 1410. This provision permits NAFTA countries to limit such ownership "for 'prudential' reasons or in pursuit of monetary and related credit policies or exchange rate policies."⁸⁵ However, if LongTerm concluded that the limitations on ownership under articles 6 and 7 of the FIL resulted in favorable treatment for Mexican financial services institutions under NAFTA article 1405, LongTerm may be able to initiate a dispute settlement proceeding against the Mexican government. Such a proceeding may be brought under articles 1116 and 1117 if the claim involved one of the selected provisions of the Investment Chapter, which create an exception to the general NAFTA rule that only NAFTA countries may initiate or participate in dispute settlement proceedings.⁸⁶

While the 1993 FIL represented an advance in Mexico's posture toward foreign investment, the 1995 Amendments were passed "to permit and encourage increased foreign investment in Mexican banks."⁸⁷ Among many changes, the 1995 Amendments raised the limit on foreign minority investment ownership in Mexican financial institutions from thirty percent to forty-nine percent. While the 1995 Amendments did not increase the five percent limit on individual ownership existing under the previous law, they did increase to twenty percent (from ten percent) the individual ownership limit obtainable with regulator approval.⁸⁸ Further, the 1995 Amendments, by allowing foreign investors access to a wider range of classes of stock, have made it possible for foreign investors "to obtain some degree of control over a Mexican bank."⁸⁹

83 See Kenneth L. Bachman et al., *Financial Services Under the North American Free Trade Agreement: An Overview*, 28 INT'L LAW. 291, 295 (1994).

84 For example, foreign investors may not only establish subsidiaries in Mexico, but also group holding companies, which may then establish or acquire "other Mexican companies engaged in providing financial services . . . (and thereby) expand its business to provide any financial service that a domestic Mexican investor could provide under Mexican law." Christopher R. Rowley, *Searching for Stability: Mexico's 1995 Banking System Reforms*, 4 NAFTA: L. & BUS. REV. AM. 30, 34 (Summer 1998) (citing NAFTA annex VII(C)(5)).

85 Bachman, *supra* note 83, at 301.

86 See *id.* at 304.

87 Rowley, *supra* note 84, at 39.

88 See *id.* at 41.

89 *Id.* Foreign investors could conceivably gain such control by having "institutional investors" acquire a significant amount of Mexican-owned Class A majority shares, supplemented by individual foreign investors (each holding less than five percent ownership, or less than twenty percent with regulator approval), owning forty-nine percent of Class B shares.

Thus, the 1995 Amendments strengthen Mexico's defense to any potential LongTerm claim under NAFTA articles 1116 and 1117 for violation of the national treatment principle guaranteed by article 1405. However, significant limitations remain, which continue to limit LongTerm's ability to gain *in rem* interests in secured assets if opting for a regular pledge structure of financing, or LongTerm's ability to expand operations into third party brokerage services under the Securities Guaranty. While the FIL and 1995 Amendments may have brought Mexico closer to fulfilling its NAFTA obligations, the path to affordable credit for Mexico may be less by national treatment and more by distancing title from the analysis of possessory interests arising from secured financing mechanisms.

VIII. Enforcement of a Mexican Bankruptcy Decision in a U.S. Court.

Another factor in LongTerm's decision among secured financing mechanisms is the likelihood of enforcing a Mexican bankruptcy decision in a United States court. Section 304 of the U.S. Bankruptcy Code enhances a foreign bankruptcy trustee's ability to succeed in a cross-border insolvency proceeding.⁹⁰ Prior to section 304, U.S. courts required that the proceeding comply with the common law doctrine of comity to be enforceable in a U.S. court.⁹¹ Section 304 alters this scheme by reducing comity to merely one factor among six for judicial consideration when deciding a question of enforcing a foreign bankruptcy judgment, which is to be guided by the best assurance of "an economical and expeditious administration of (foreign) estate."⁹²

90 See Helmut Gerlach, *Bankruptcy in the Czech Republic, Hungary, and Poland, and Section 304 of the United States Bankruptcy Code, Proceedings Ancillary to Foreign Bankruptcy Proceedings*, 22 MD. J. INT'L L. & TRADE 81, 106 (1998).

91 In the international bankruptcy context, comity is an attempt to reconcile the choice of law concepts of universality, territoriality, and reciprocity. Universality prefers one main bankruptcy proceeding, presumably in the country of the debtors' domicile or principle place of business, which addresses all of the debtor's property, regardless of location, to be distributed to all creditors. The territoriality approach prefers a bankruptcy proceeding to address only property that is located within the country's jurisdiction, and to distribute such property only to creditors appearing before a court and asserting a claim. See *id.* Reciprocity "exists when two countries mutually recognize (or refuse to recognize) each other's laws." Comity, in its broad appeal to international duty, convenience, and the rights of a country's own citizens, gave rise to a widely discretionary doctrine that tended to both create a nationalistic bias in favor of U.S. creditors and discourage foreign representatives from seeking relief in U.S. courts. See Eric W. Lam, *Bankruptcy Code Section 304(B)(3): "Other Appropriate Relief" for Multinational Bankruptcy*, 16 BROOK. J. INT'L L. 479, 483 (1990).

92 Section 304 provides:

Cases ancillary to foreign proceedings

(a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.

(b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial, the court may—

(1) enjoin the commencement or continuation of—

(A) any action against—

(i) a debtor with respect to property involved in such foreign proceeding; or

(ii) such property; or

Section 304 has been interpreted both as a move away from territoriality toward universality, and as a compromise between the two.⁹³ The discretionary nature of section 304 has given rise to a wide range of application, as illustrated by the contrasting approaches taken in *In re Culmer*⁹⁴ and *In re Toga Manufacturing Limited*.⁹⁵

Toga featured a U.S. creditor who had obtained a valid judgment against a Canadian company and lawfully collected certain debts owed to that company. Six months later, the company became a debtor in Canadian insolvency proceedings and the Canadian trustee brought an action under section 304 seeking turnover of the collected funds that had been paid into Michigan state court. The U.S. court determined that the creditor would be considered a general unsecured creditor in the foreign proceeding, but a secured creditor with respect to the collected funds under U.S. bankruptcy law. The court concluded that the "substantially unequal treatment" that the creditor would face warranted a denial of the request for turnover.⁹⁶ While the *Toga* precedent is potentially reassuring for LongTerm should any Mexican bankruptcy trustee attempt to block a distribution of funds to LongTerm by a U.S. court, it has been described as an "emasculatation" of section 304,⁹⁷ in contrast with the more deferential standard of *Culmer* which, unlike *Toga*, has been described as a "model application" of section 304.⁹⁸

In *Culmer*, rather than inquiring whether a Bahamian liquidation would impose "substantially unequal treatment" upon the creditors of a Bahamian corporation, the

(B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;

(2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or

(3) order other appropriate relief.

(c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with—

(1) just treatment of all holders of claims against or interests in such estate;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of such estate;

(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;

(5) comity; and

(6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

93 Compare Lam (arguing § 304 as a compromise between universality and territoriality) with Gerlach (arguing § 304 as a step toward universality).

94 25 B.R. 621 (Bankr. S.D.N.Y. 1982).

95 28 B.R. 165 (Bankr. E.D. Mich. 1983).

96 Daniel M. Glosband & Christopher T. Katucki, *Claims and Priorities in Ancillary Proceedings under Section 304*, 17 BROOK. J. INT'L L. 477, 487 (1991) (citing Gallagher & Hartje, *The Effectiveness of Section 304 in Achieving Efficient and Economic Equity in Transnational Insolvency*, 1983 ANN. SURV. BANKR. L. 1, 21 (1983)).

97 *Id.* at 489.

98 *Id.* at 491 (citing R. GITLIN & R. MEARS, 2 INTERNATIONAL LOAN WORKOUTS AND BANKRUPTCIES 94 (1989)).

court considered whether there was anything "inherently vicious, wicked, immoral or shocking to the prevailing American moral sense in the Bahamian laws."⁹⁹ Such a lax standard may not even have been necessary for a U.S. court to recognize the Bahamian proceeding under section 304, because the *Culmer* court noted the "substantial similarity" between American and Bahamian bankruptcy law.¹⁰⁰ *Culmer* and *Toga* respectively illustrate the potential for section 304 application to serve either universalist or protectionist ends. The two cases also illustrate two extremes, which set off an emerging, moderate consensus under section 304: "The majority of recent cases applying section 304 . . . recognize foreign insolvency proceedings as long as such proceedings comport with the notions of fairness and due process."¹⁰¹

Given the uncertainty of section 304 application, LongTerm may be well-advised to place more importance on the more determinable prospects of securing a property interest in Mexican-based collateral and obtaining an expedient, extrajudicial sale and distribution of such a secured interest, rather than the less determinable prospects of further reducing credit risk by securing U.S.-based assets in an ancillary bankruptcy proceeding in a U.S. court. Nevertheless, use of the Pledge, Guaranty Trust, and Securities Guaranty may receive materially different treatment under section 304 as applied by a U.S. court, whether that court applies the *Toga*, *Culmer*, or due process standard.

While the procedural burdens associated with the Pledge may raise questions under section 304(c)(2), which seeks to protect U.S. creditors from prejudicial or inconvenient proceedings, it is precisely those procedural burdens which ease the due process concerns more associated with the extrajudicially administered Securities Guaranty and Guaranty Trust. Such due process concerns in turn implicate section 304(c)(1), which seeks the "just treatment of all holders of claims against or interests in" the foreign estate. Therefore, while use of the Pledge may strengthen LongTerm's position by claiming inconvenient foreign procedure under section 304(c)(2), use of the Securities Guaranty or Guaranty Trust may cut against LongTerm by possibly raising due process concerns under section 304(c)(1).

However, given that article 9-502(1) affords a broad, extrajudicial self-help remedy for creditors to gain possession of secured collateral, the due process concerns raised by the Securities Guaranty and Guaranty Trust appear to be less, rather than more, threatening than those facing debtors under U.S. law. In light of article 9-502(1), a U.S. court may indeed be inclined to weigh creditor inconvenience more heavily than debtor due process, and thereby negate any potential advantage of the pledge over the Securities Guaranty or Guaranty Trust were LongTerm to seek enforcement of a Mexican bankruptcy proceeding in a U.S. court.

Were LongTerm to choose between the Securities Guaranty and Guaranty Trust, enforceability abroad may be of limited concern for different reasons. First, under the Guaranty Trust, as discussed above, debtor bankruptcy is of limited concern for LongTerm, only arising if the debtor retained a reversionary interest in the entrusted

99 *Id.* at 492 (citing *In re Culmer*, *supra* note 94, at 631).

100 *In re Culmer*. The court notes that the Bahamian law, like U.S. law, "provides a comprehensive procedure for the orderly and equitable distribution of [the bankrupt's] assets among all of its creditors." *Id.*

101 Beckham & Fernandez, *supra* note 68, at 70.

property under the Trust Agreement, or if such Trust Agreement were completed during a "suspicious period" prior to the debtor bankruptcy. U.C.C. article 8-503 is significantly different from the Guaranty Trust mechanism, providing that securities held by an intermediary for entitlement holders are neither the intermediary's property nor are they subject to the claims of the intermediary's general creditors.¹⁰² As with the Pledge, the more favorable creditor terms under article 8 as compared with the Guaranty Trust may provide LongTerm with some assurance of enforceability in a U.S. court. However, as discussed above, the need to create the trustee's extrajudicial functions exclusively via contract, without statutory support as provided by LMV article 99 for the Securities Guaranty, results in greater due process concerns for the Guaranty Trust than the Securities Guaranty. Nonetheless, article 9-502(1) appears to undermine any potential debtor due process argument to be brought by a Mexican bankruptcy trustee under section 304.

For the Securities Guaranty under section 304, a U.S. court is likely to not protect LongTerm's interests to the same extent as if enforcing the inconvenient pledge, but neither is a U.S. court likely to scrutinize the due process implications of the Securities Guaranty to the extent of the Guaranty Trust. Therefore, use of the Securities Guaranty does not appear to significantly help or hurt LongTerm's ability to enforce a bankruptcy judgment in a U.S. court vis-à-vis the Pledge and Guaranty Trust. However, the well-defined structure of the Securities Guaranty under LMV article 99, which helps to reduce due process concerns, also greatly reduces the availability of debtor U.S.-based property that may be attached by LongTerm. That is, only a broad reading of "fungibility" would permit a creditor to attach U.S.-based assets pursuant to a debt created by the tightly defined collateral and depository requirements of the Securities Guaranty. Therefore, if LongTerm wants U.S.-based assets to play a significant role in their risk reduction scheme, it may be worth absorbing some section 304 risk in the form of greater due process concerns in exchange for more legitimate access (via careful tailoring of a Guaranty Trust Agreement) to U.S.-based debtor assets. However, LongTerm may be even better advised to focus more on the probability of recovering Mexican-based assets via the Securities Guaranty, rather than spreading a Trust Agreement so thin as to provide significant U.S.-based coverage, risking the initial enforceability of such an agreement at the primary bankruptcy proceeding in Mexico.

An important question that 1980s cases like *Culmer* and *Toga* do not address is the potential impact that NAFTA obligations may have on a section 304 analysis. Given the interdependence of bankruptcy policy and creditor risk, and therefore the effects of bankruptcy policy on the price of credit, U.S. courts may consider placing greater scrutiny on the bankruptcy schemes of fellow NAFTA countries, which appear to be significantly opposed to the U.S. bankruptcy scheme and U.S. policy as fostering affordable credit. NAFTA's "national treatment" standard, as well as the need for relatively competitive secured financing offerings among the NAFTA members, could thus be monitored in part via section 304. However, such monitoring would actually drive a court toward the more protectionist *Toga* standard and away from the heralded universality of *Culmer*.

102 James Gadsden & Austin D. Keyes, *Revised Article 8 of the Uniform Commercial Code: Investment Securities*, 115 BANKING L.J. 346, 351 (1998).

Therefore, U.S. courts should consider whether sacrificing some universality under section 304 is worth the benefit of an additional method for policing NAFTA obligations among member countries.

IX. Conclusion.

NAFTA and section 304 of the U.S. Bankruptcy Act represent harmonizing forces operating within legal systems that retain certain fundamentally different understandings of ownership and the relationship between creditors, debtors, and third parties. Pragmatic attempts to close some of these gaps, as illustrated by the Securities Guaranty, while creating new opportunities for investment, carry far greater promise if introduced in tandem with more fundamental changes to the law governing security interests in personal property.

Mexico currently has an opportunity to create, by way of both statutory support and customary use, a property interest arising from the otherwise *in personam* mechanism of the Securities Guaranty, which could serve as an important step in the NAFTA-driven need for Mexico to distance its secured financing law from traditional *in rem/in personam* distinctions. Softening the link between title and property interests within secured financing law may also lead to beneficial changes in Mexican bankruptcy law. Those changes are likely to affect the price of credit as much as the laws regulating secured financing.